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No. 57691-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR.[1]

The judgment and sentence is facially invalid and contrary to the state and federal constitutional prohibitions on double jeopardy where the court intended to merge the two offenses of conviction based on the double jeopardy violation, and the prosecution conceded the offenses should merge, but the court imposed sentences on both offenses despite the double jeopardy violation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Multiple convictions for the same offense violate double jeopardy even when the court imposes concurrent sentences. Here, the court and prosecution agreed Weaver's two convictions merged. Despite this agreement, and even though the court did not count the offenses as separate convictions in Weaver's offender score, the court imposed two concurrent sentences for Weaver's convictions. Where the court intended to treat two offenses as a single conviction and double jeopardy rules allow only a single conviction, must this case be remanded for the sentencing court to strike one of Weaver's two convictions and impose a new sentence?

[1] A motion to file a supplemental assignment of error is being filed simultaneously with this briefing.

2. Pursuant to sentencing statutes and the requirements of due process of law, a court's calculation of criminal history must rest on proven or affirmatively acknowledged facts. Here, Weaver did not acknowledge his criminal history, and the only findings the trial court made was that Weaver had two felony convictions from the early and mid-1980s, without mentioning that these offenses may not be counted as criminal history if Weaver was crime-free in the community for 10 years. Because the record does not show that the court relied on proven facts and found Weaver's prior convictions had not "washed out" for sentencing purposes, the case must be remanded for resentencing.[2]

C. ARGUMENT.

1. AS THE STATE CONCEDED AT SENTENCING, WEAVER'S TWO CONVICTIONS VIOLATED DOUBLE JEOPARDY AND ONE MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE

Oliver Weaver was convicted of one count of rape of a child in the second degree and one count of second degree rape based on a single act of sexual intercourse against the same victim. CP 39-40 (verdict); CP 41-42 (amended information); CP 74-84 (judgment and sentence, attached as Appendix A). The court and

[2] This issue relates to Assignment of Error 3 in Appellant's Opening Brief.

prosecution agreed that the offenses merged and should not be counted as separate convictions at sentencing but the court did not strike one conviction from Weaver's criminal history. 4/8/05RP 372-73; CP 78. Pursuant to the recent decisions in State v. Hughes, 166 Wn.2d 675, 686, 212 P.3d 558 (2009), and State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007), the court's imposition of convictions for rape in the second degree and rape of a child in the second degree violates the state and federal constitutional prohibitions against double jeopardy, and one conviction must be vacated.

a. The constitutional bar on double jeopardy prohibits multiple punishments for the same offense. The state and federal double jeopardy clauses reject the imposition of multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); U.S. Const. amend. 5; Const. art. 1, § 9. Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

While the State may charge and the jury may consider multiple charges arising from the same conduct in a single

proceeding, the court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71; North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007)).

In Hughes, the Supreme Court ruled that rape in the second degree and rape of a child in the second degree based on the same incident violate double jeopardy and one conviction must be vacated. 166 Wn.2d at 686. The Hughes Court reasoned that the two rape offenses "are the same in fact because they arose out of one act of sexual intercourse." Id. at 684. The court recognized some facial differences in the language of the statues, as rape of a child involved the age of the child, and, under the prong of rape in the second degree at issue in Hughes, it required evidence of the victim's mental incapacity or physical helplessness, as the child victim in Hughes had cerebral palsy. Id. at 679, 684. The Hughes Court cautioned that the purpose of the statutes should not be construed too narrowly. Id. at 684.

Instead, the court focused on whether the legislature intended to preclude multiple punishments. Id. at 684-85. The offenses of rape and rape of a child are listed in the same portion of the criminal code, which is a crucial consideration in discerning the intent to punish the same act separately. Id. at 685. The Hughes Court emphasized that in other cases, courts have "specifically recognized that the legislature did not intend one act of sexual intercourse" to require multiple punishments. Id. at 685-86 (citing State v. Birgen, 33 Wn.App. 1, 651 P.2d 240 (1982) (finding double jeopardy violation in rape and statutory rape convictions for same conduct); State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) (finding no double jeopardy violation in rape and incest convictions based on different placements in criminal code but citing Birgen favorably for offenses at issue in that case). Both offenses have the same seriousness level and subject Weaver to the identical sentencing range. CP 75; RCW 9.94A.515.

As the court ruled in Hughes, and as the prosecution and trial court agreed in the case at bar, the legislature intended a single penalty for Weaver's two convictions based on offenses contained in the same portion of the criminal code and which rested on a single act of sexual intercourse against one person.

b. The prosecution and the court agreed the convictions must merge. At sentencing, the prosecution "acknowledged" that under the facts of this case, "the two crimes the defendant were [sic] convicted of do merge for sentencing purposes." 4/8/05RP 371. Likewise, the court found, "[t]hese two crimes do merge for sentencing." Id. at 383. The court calculated Weaver's offender score as if the two offenses were a single offense and did not separately count the offenses when determining Weaver's offender score. CP 74-78.

Yet despite the prosecution's concession that the offenses must merge, it revived the two convictions in its quest for an exceptional sentence, telling the court that despite the merger, "we do have two separate crimes." 4/8/05RP 376. The prosecution did not retreat from its concession that the offenses should merge and did not ask the court to separately count both offenses in Weaver's offender score, but it admitted that it was asking the court to consider both offenses in deciding whether to impose an exceptional sentence. Id. The 250-month term requested and imposed appears to result from the adding together the high end of the standard ranges for each offense. CP 75.

The court voiced no disagreement with the merger of the offenses, and expressly ruled that must be treated as a single offense. 4/8/05RP 383. But in the judgment and sentence, the court's findings stated that Weaver was convicted of two offenses; it listed both offenses as offenses for which sentence was being imposed; and it imposed concurrent sentences for these two offenses. CP 74-78. Thus, despite its stated intent to merge the two offenses, the court in fact imposed sentences for both offenses without any indication that they should be treated as a single offense on the judgment and sentence.

Moreover, the judgment and sentence has a box that a court must mark if treating offenses as the same criminal conduct. CP 75. The court left this box unmarked, and thus did not order the offenses be treated as same criminal conduct. CP 75 (section (i) of "special verdict of findings"). Thus, the court did not treat the offenses as the same criminal conduct.

c. The required remedy is to remand the case for resentencing. The judgment and sentence does not reflect the court's intended sentence or the prosecution's concession. Both agreed that the convictions should not be separately imposed based on the facts of the case but the final written sentencing order

inexplicably lists both convictions and imposes concurrent punishment for both offenses. CP 74-78.

In Womac, the Supreme Court rejected the prosecution's contention that when the court imposes only a single sentence, there is no double jeopardy violation. 160 Wn.2d at 656-57. The court explained, "[t]hat Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions." Likewise, Weaver still suffers the consequences of two convictions even though the court apparently did not use both convictions in calculating his offender score.[3] Despite its proclaimed intent to merge the two convictions, the court imposed concurrent terms for the two offenses. Even though the court imposed an exceptional sentence, the prosecution asked the court to consider the two convictions in determining the length of the sentence imposed. 4/8/05RP 376. The court imposed an exceptional sentence that equaled the doubling of the high end of the standard range for the two offenses.

In light of the double jeopardy violation, as well as the inconsistency between the court's stated intent to merge the

[3] Because the court did not explain how it calculated Weaver's offender score, it is not clear exactly what analysis the court used, as explained in more detail in the argument below.

offenses and its actual imposition of two convictions and two sentences, remand for resentencing is required. Because the two offenses have the same seriousness level, the trial court may engage in further fact-finding to determine which conviction must be vacated. Hughes, 166 Wn.2d at 686 n.13.

2. WHERE THE COURT DID NOT EXPLAIN ITS CALCULATION OF CRIMINAL HISTORY AND WEAVER DID NOT AFFIRMATIVELY AGREE TO INCLUDE HIS ALMOST 20-YEAR OLD CONVICTIONS, THE COURT DID NOT PROPERLY CALCULATE WEAVER'S OFFENDER SCORE AND HIS SENTENCE MUST BE REMANDED FOR FURTHER FACT-FINDING

Remand is required for a new sentencing hearing. Weaver did not agree to the prosecution's calculation of his offender score and the trial court offered no explanation as to how it calculated Weaver's offender score despite the facially apparent "wash out" of Weaver's only prior felony convictions from the early 1980s. There is no clear record that the court considered, reviewed, or relied on the prosecution's belatedly offered Department of Corrections (DOC) presentence report, and thus, the accuracy of the court's calculation of Weaver's standard range cannot be discerned absent remand.

a. Weaver did not agree to or acknowledge his criminal history for purposes of calculating his offender score. At sentencing, Weaver's attorney did not offer any analysis of or agreement regarding Weaver's offender score. 4/8/05RP 378-80. He argued against an exceptional sentence above the standard range. He said that Weaver had "some criminal history in his younger days," but emphasized that "he grew out of that and became a successful husband and father and business man." Id. at 378. He did not mention or acknowledge the validity or existence of any misdemeanor convictions.

The prosecution claims on appeal that the trial court received and implicitly considered a presentence report prepared by DOC, which contains a list of misdemeanor convictions that was either prepared by a prosecutor or a DOC staff person. The document does not explain the source establishing these listed misdemeanor convictions, and the State offered no certified court records. The DOC presentence report was not filed in the trial court until the prosecution's recent motion to include the report, even if it may have been prepared for sentencing. The trial court judge never mentioned receiving, reviewing, and relying upon this

unfiled DOC report. Accordingly, it should be disregarded on appeal.

b. The court made no record explaining why or how it included Weaver's prior convictions in his offender score. In Weaver's judgment and sentence, the court purports to list all pertinent criminal history used to calculate his criminal history. CP 81 ("The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525)."). But the sentencing court listed only two second degree burglary convictions from the early 1980s and no other offenses.

At sentencing, the court made no reference to whether it considered Weaver's prior convictions had "washed out" based on intervening misdemeanors. The instant offense occurred in 2002, and if the State proved that a misdemeanor conviction stopped these offenses from "washing out," after ten crime-free years, the court made no finding of any such misdemeanor conviction for the relevant period.

In its original decision, this Court stated that the sentencing court has no duty to list predicate convictions in the judgment and sentence and the requirement to explain whether an offense has "washed out" is simply "clerical." Slip op. at 18-19. But it is a long-

standing rule, reaffirmed in State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009), that the sentencing court must comport with the requirements of due process of law and must follow the statutory mandate of including only proven, valid offenses in an offender score.

RCW 9.94A.525(2) mandates that prior offenses, "shall not be included" if they have washed out. The term "shall" indicates a mandatory duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). The statute's plain language does not say that a court includes prior offenses "unless" they are shown to have washed out. The statute obligated the State to offer sufficient proof to permit the trial court to determine the prior offenses should be included in the offender score -- proof that the offenses have not washed out, unless there is an affirmative agreement to the criminal history.

Due process requires the State bear the burden of proving an individual's criminal history and offender score by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); see Mendoza, 165 Wn.2d at 921. Where the State fails to offer sufficient evidence such that the record fails to support the criminal history and offender score

calculation, the defendant is denied the minimum protections of due process. Ford, 137 Wn.2d at 481.

Second degree burglary is a class B felony. RCW 9A.56.030(2). Before a court can include a Class B felony in a person's offender score, the court must determine the person has not spent ten crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525 (2). Because the burden of proof fails squarely on the State, under RCW 9.94A.525(2), the court may not include a conviction in the offender score unless State proves and the trial court finds ten years have not elapsed based on the dates of offense, conviction, sentencing, and release from confinement. Moreover, the State must prove, and the trial court must find, the date of offense for any intervening misdemeanor convictions which may have prevented the listed offenses from washing out.

Here, the judgment and sentence listed two prior "Burglary 2" offenses with their sentencing dates, "6/12/1985" and "6/10/1981," respectively. CP 30. But there was no written or oral determination by the court as to the amount of time served or the date of release from confinement on any of the offenses. Nor is there any finding of the dates that any of the offenses were

committed. Hence, the court did not find that either of the listed offenses had not washed out.

c. Weaver did not acknowledge and agree to include the prior burglary convictions in his offender score. The sentencing court did not rely on acknowledged facts in determining Weaver's offender score and made no finding that the prosecution had proven Weaver's offender score, and thus, remand for resentencing is required. Mendoza, 165 Wn.2d at 929.

During Weaver's appeal, the prosecution claimed DOC submitted a presentence report listing misdemeanor convictions. But even if DOC prepared such a report, the trial judge has never said she received, reviewed, and approved of these misdemeanors when calculating Weaver's offender score. Weaver maintains his opposition to the consideration of this presentence report in the appellate court, as the factual inquiry is for the sentencing court, where competent counsel has resources available to investigation the accuracy of this criminal history. Appellate counsel has no access to criminal history databases or documents, and Weaver's trial counsel's sentencing remarks are devoid of any mention of the existence of such misdemeanors, and instead proclaim Weaver put his youthful criminal indiscretions behind him. 4/8/05RP 378.

In Mendoza, the Supreme Court ruled that the prosecutor's assertion of criminal history is not evidence of criminal history sufficient to establish such history. Certified copies of prior convictions remain the preferred means of establishing criminal history, or alternatively, the prosecution may offer evidence such as transcripts from prior proceedings. Id. at 921. As the Mendoza Court held, "the prosecutor's Statement of a defendant's criminal history is not a presentence report for the purposes of former RCW 9.94A.500(1) and former RCW 9.94A.530(2). Id. at 925.

"Acknowledgment" for purposes of determining criminal history, requires "the need for an *affirmative* acknowledgment by the defendant of *facts and information* introduced for the purposes of sentencing." Id. at 928 (emphasis in original). A failure to object to a prosecutor's assertions of criminal history does not constitute the required acknowledgment. Id. A defendant does not "affirmatively acknowledge" criminal history by agreeing to the prosecutor's sentencing recommendation. Id. "Bare assertions" of criminal history do not substitute for the facts a sentencing court requires. Id. at 929.

Weaver did not mention his criminal history at sentencing, other than discussing how his convictions occurred long ago. The

trial court made no findings that Weaver's prior convictions had not "washed" by virtue of their age. The trial court has not said it reviewed and relied on the DOC presentence report. The prosecution did not present certified copies of intervening misdemeanor convictions. The focus of the sentencing hearing was on whether Weaver should receive an exceptional sentence greater than the standard range. Because the court did not properly determine whether Weaver's prior convictions must be counted in his offender score despite their age as required by RCW 9.94A.525 and Mendoza, a new sentencing hearing is required to ensure Weaver received an accurate consistent with the requirements of due process.

D. CONCLUSION.

Oliver Weaver respectfully requests that his case be remanded to the trial court for accurate re-sentencing consistent with the requirements of double jeopardy and due process.

DATED this 30th day of November 2009.

Respectfully submitted,

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